In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

No. 65

WEYERHAEUSER STEAMSHIP COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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I. THE EXPRESS WORDS OF LIMITATION "HIS LEGAL REPRESENTATIVE, SPOUSE, DEPENDENTS, NEXT OF KIN . . ." RESTRICT THE "EXCLUSIVITY" PROVISION OF SECTION 7(b) TO DIRECT ACTIONS BROUGHT BY THE EMPLOYEE OR HIS BENEFICIARIES.

By mere repetition of a phrase—"anyone otherwise entitled to recover damages . . ."—respondent attempts to convince the Court that "the express terms" of Section 7(b) of the FECA preclude application in this case of the accepted divided damages rule in admiralty. Respondent, however, conveniently ignores the accepted rules of statutory construction set forth in Brief for Petitioner at pp. 6 and 7, and blandly attempts to dismiss the limit-

ing words of Section 7(b) by implying that "the Senate version" did not contain them. Respondent's dread of the words of limitation in the statute is illustrated by its failure to quote them when purporting to recite the "explicit" provisions of the statute at pp. 8, 9 and 10 of its brief. Each recitation omits the words of limitation "his legal representative, spouse, dependents, next-of-kin . . . ."

The decisions of the circuit courts cited in footnote 8 at p. 25 of Brief for the United States are not determinative of the issue herein. They merely confirm the effect of the words of limitation in Section 7(b) that the employee and his direct beneficiaries have no common law rights against the employer.

II. THE LEGISLATIVE HISTORY OF THE 1949 AMENDMENTS REVEALS NOT AN IOTA OF EVIDENCE THAT CONGRESS INTENDED RESPONDENT'S ASTOUNDING CONCLUSION THAT THE THIRD PARTY BEAR THE ENTIRE BURDEN FOR BOTH THE NEGLIGENT EMPLOYER AND INJURED EMPLOYEE.

Respondent has made no effort to contradict the fact set forth in Brief for Petitioner at pp. 9-12 that in the legislative history of the 1949 amendments to the FECA there is not a shred of evidence that Congress intended to alter existing third party rights. In its discussion of the legislative history of Section 7(b) respondent ignores the fact that the phrase "unless otherwise specifically provided by law" was stricken from the original committee version of the "exclusivity" provision. The only logical conclusion following from that revision of the section is that the committee did not wish to place the burden of establishing the survival of existing rights and remedies on the party asserting them.

Petitioner has no quarrel with respondent's extended discussion of the rationale of so-called "exclusivity" provisions in workmen's compensation statutes. It agrees that the employer in exchange for guaranteeing the employee compensation receives a *quid pro quo* of limited liability *with respect to direct actions by the employee or his direct beneficiaries.* This policy, however, does not determine the issue of the negligent employer's liability to third persons such as petitioner, who has received no *quid pro quo* in the statute. Similarly, the fact that *The Atlas* (1876) 93 US 302 and *The Juanita* (1876) 93 US 337 held that the innocent victim of a collision could recover full damages from either of the negligent vessels is not determinative of the equities herein. Both cases specifically recognized the moiety rule of damages as between the two vessels, and it is patent from the opinions of this Court that the results were predicated on the ability of the single vessel against whom a judgment was rendered to add the judgment to the damages to be divided. Section 7(b) of the FECA has the effect of eliminating the injured employee's remedy against his own vessel, when it is operated by the United States Government. The statute clearly does not, however, alter the *substantive right* of the other vessel to share *all damages* according to the accepted rule.

Respondent at p. 18 of Brief for the United States also asserts that the fact that the act gives the employer a lien against any common law recovery of the employee to the extent of the employer's compensation payments is conclusive evidence that Congress intended no third party recovery. Respondent then concludes:

> If follows, *a fortiori*, that no employee would be allowed to increase his recovery by a tort action if

the result would be to impose upon the United States a liability *in excess of* that imposed by the statute.

Ryan Stevedoring Company v. Pan-American Steamship Corp. (1956) 350 US 124, and the cases following it, specifically refute respondent's reasoning and statement. In these cases the employee's tort action against the third party in fact increased the negligent employer's liability beyond that provided by the compensation act. The same reason and justice as prevailed in *Ryan* argue that the accepted admiralty principle of divided damages and the express policy of Congress in the Public Vessels Act, 46 USC 781 *et seq.*, not be altered by indirection.

III. ABSENCE OF A CONTRACTUAL RELATIONSHIP BETWEEN PETITIONER AND RESPONDENT SHOULD NOT AFFECT PETITIONER'S RIGHT TO RECOVERY FROM THE NEGLIGENT EMPLOYER UNDER THE ACCEPTED DIVIDED DAMAGES RULE.

Respondent attempts to dismiss this Court's considered decision and reasoning in *Ryan Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corp., supra*, and cases following it, wherein the shipowner was permitted to recover full indemnity from the negligent stevedore employer. Respondent fails to justify a moral or logical reason for a different result in this action. Respondent argues at p. 31 of its brief that these cases are not in point because the decisions emphasized the contractual relationship of shipowner and stevedore. In its brief petitioner states at p. 17—and respondent makes no effort to refute this proposition—that "There is every indication in the *Ryan* opinion . . . that this Court employed 'con-

tract' vocabulary in order to reach an equitable result without expressly overruling *Halcyon Line v. Haenn Ship Ceiling and Refitting Corporation* (1952) 342 US 282. . . ." The Ninth Circuit has recently endorsed petitioner's statement in *Italia Societa Per Azioni di Navigazione v. Oregon Stevedoring Company, Inc.*, No. 17,616, decided October 25, 1962, where, in ruling on the standard of liability to be applied to the stevedoring company being charged with breach of its warranty of workmanlike service, the Court commented on the *Ryan* decision at p. 8: "If the shipowner was to be relieved at all from the onerous burden of *Halcyon*, liability against the stevedoring company for its wrongs would necessarily have to be predicated upon contracts and not tort." Similarly, the right of petitioner to recover one-half of the settlement with Ostrom arises out of the failure of respondent in its duty to petitioner to navigate safely or share the result of its negligence according to the accepted divided damages rule.

Respondent accuses petitioner at p. 31 of its brief of "overruling without discussion this Court's limitation of the doctrine of contribution in *Halcyon Lines v. Haenn Ship Corp.*, 342 US 282." In making this startling statement, respondent ignores the fact that petitioner in this case merely seeks application of the accepted moiety rule between mutual wrongdoers in a both-to-blame collision. That rule is emphasized and specifically recognized in the *Halcyon* decision, in which the Court stated:

> Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained

by each, as well as personal injury and property damage inflicted on innocent third parties. 342 US 282, 284.

In the *Halcyon* case this Court specifically refused to accept the employer's defense that the so-called "exclusive" liability provision (Section 5 of the Longshoremen's and Harbor Workers' Act) nearly identical to the one in issue herein prevented the third party from recovering from the negligent employer. The Court recognized that the "exclusivity" provision did not resolve the issue of third party rights against negligent employer.

CONCLUSION

Petitioner respectfully submits for the above reasons that this Court should reverse the decision of the Court of Appeals and order reinstated the decision of the District Court that the settlement paid to Ostrom be included as an item of damages to be divided according to the accepted rule.

Dated, San Francisco, California,
November 19, 1962.

Respectfully submitted,

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